93-906

No.

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1993

SCHULMERICH CARILLONS, INC.,

Petitioner,

vs.

PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Has the Pennsylvania Unemployment Compensation Bureau violated the constitutional rights of appellant under Article VI, clause 2 of the United States Constitution and the Fourteenth Amendment thereto by insisting on charging the experience rating of appellant with the UC payments made during the work stoppage, based on its holding that the Company was required to agree to the Union demands of an indefinite extension of all the terms of the contract with the Union, including the provisions for compulsory arbitration of all disputes, including any disputes based on matters occurring after expiration of the original contract, contrary to provisions of the National Labor Relations Act, as interpreted by the federal courts?

Since the unemployment compensation program is a national program subsidized by the federal government, and the above questions arise frequently and affect the extent to which unemployment compensation funds are depleted, shouldn't employers, unions and authorities know where the line is to be drawn under federal law and not under the different decisions of fifty separate states?

PARTIES TO THE PROCEEDING

The parties to this proceeding other than the parties identified in the caption[1] are as follows:

Union Local Lodge 152, International Association of Machinists and Aerospace Workers, 634 North West End Boulevard, Quakertown, Pennsylvania.

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1. Pursuant to Rule 28.1, Petitioner has no affiliate and is privately held.

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No.

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SCHULMERICH CARILLONS, INC.,

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vs.

PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of Pennsylvania

PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

Prior judicial and administrative decisions, findings and opinions concerning this action are as follows:

1. The Order of the Pennsylvania Supreme Court dated September 9, 1993 denying Petition for Allowance of Appeal is reproduced in the Appendix, *infra*, at 1a.

2. The Opinion and Order of the Pennsylvania Commonwealth Court filed March 19, 1993 affirming the Order of the Pennsylvania Unemployment Compensation Board of Review is reproduced in the Appendix, *infra*, at 2a-10a.

3. The Order of the Pennsylvania Unemployment Compensation Board of Review dated April 16, 1992, affirming the Referee's Decision is reproduced in the Appendix, *infra*, at 11a-16a.

4. The findings, reasoning and decision of the Pennsylvania Unemployment Compensation Referee dated January 21, 1992 affirming the determination of the Pennsylvania Office of Employment Security allowing benefits (on the basis of constructive lockout by Petitioner) is reproduced in the Appendix, *infra*, at 17a-22a.

STATEMENT OF JURISDICTION

Petitioner seeks a review of the opinion and decision of the Pennsylvania Commonwealth Court filed March 19, 1993 as to which the Pennsylvania Supreme Court declined Petitioner's Petition for Allowance of Appeal by order dated September 9, 1993. Subject matter jurisdiction to review such opinion and decision is conferred upon Your Honorable Court by the provisions of § 2101(c), Title 28, United States Code, as well as the provisions of Rules 10, 12, *et al.* of the United States Supreme Court.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Article 6, Clause 2, of the United States Constitution.

> This Constitution, and the Laws of the United States, which shall be made in pursuance

thereof; and of all treaties made, or which shall be made, under the authority of the United States, shall be the Supreme Law of the Land; and the judges in every state shall be bound thereby, anything in the Constitution or Laws of any State to the contrary notwithstanding.

2. Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law.

3. PennsylvaniaUnemployment Compensation Law, Section 802(d), 43 Purdon's Pennsylvania Stat., Annotated, 802A.

802. Ineligibility for Compensation. An employee shall be ineligible for compensation for any week –

(d) in which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in, the labor dispute which

caused the stoppage of work, and (2) he is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (3) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, or directly interested in, the dispute.

STATEMENT OF THE CASE

Petitioner, Schulmerich Carillons, Inc. ("Company") manufactures and sells carillons and handbells throughout the United States from its plant and offices located in Sellersville, Bucks County, Pennsylvania. Its production employees are represented by Local #1092, International Association of Machinists and Aerospace Workers, AFL-CIO), ("Union") with whom Appellant/Company had a contract covering conditions of employment including a provision for compulsory arbitration of all disputes. That contract expired midnight, June 28, 1991, by reason of notice from the union.

Prior to contract expiration, the Company and Union were engaged in negotiations for a new contract. On June 28, 1991, in line with recent bargaining history, the Company presented its best, final package at approximately 2:00 p.m., being the deadline announced by the Union for presenting such package to the membership for a vote before contract expiration. The Union then departed from prior practice by demanding that the Company agree to an indefinite extension of the expiring contract, with all its provisions.

The Union later advised that the membership had rejected the

Company's last package but hadn't taken a strike vote, and then reiterated its demands that the Company agree to an indefinite extension of the expiring contract. The Company's representative rejected the Union's demand, first advising that it would keep in operation all of the provisions of the contract pertaining to economic conditions of employment, and later advising that while he questioned any obligation to extend mandatory arbitration, the Company was not changing any of the terms of the contract.

The Union advised the Company that it was not satisfied with the Company's position, and its membership declined to work, immediately setting up picket lines. The Union claimed that the stoppage was due to lock out, while the Company claimed that the Union was on strike. The Pennsylvania Unemployment Compensation Bureau determined that it was a lock out and arranged for payment of weekly compensation benefits to the Union membership until the parties reached a new collective bargaining agreement and the work stoppage ceased on August 19, 1991. Further, the Pennsylvania Unemployment Compensation Bureau has insisted on charging appellant's experience rating with those payments.

The question presented for review by the United States Supreme Court was first presented before the Pennsylvania Unemployment Compensation referee at a hearing conducted January 13, 1992 in Norristown, Pennsylvania. At such hearing, Petitioner, pursuant to its letter appeal from the earlier decision of the Office of Economic Security, granting benefits, asserted that inasmuch as the Pennsylvania Unemployment Compensation system was set up and subsidized by the federal government, its laws with regard to eligibility for benefits in the instant matter should be determined under federal law as enunciated under *Litton Industries v. NLRB,* 111 S. Ct. 2315 (1991). The referee rejected such position, affirming the decision of the Pennsylvania Office of Employment Security, and the referee's decision in turn was

affirmed by the Pennsylvania Unemployment Compensation Board of Review, the Pennsylvania Commonwealth Court, and indirectly by the Pennsylvania Supreme Court, which declined to review the matter.

REASONS FOR GRANTING THE WRIT

1. During all relevant periods of time, the Pennsylvania unemployment compensation system has been subsidized by the federal government. By virtue of such subsidy, Pennsylvania unemployment compensation law with respect to work stoppages is preempted by federal labor law under which a private employer, in order to maintain status quo in collective bargaining, is not obliged to agree to extend the arbitration provisions of an expired labor contract, at least with respect to disputes arising subsequent to the contract expiration date. United States Constitution, Article 6, clause 2, ; *Litton Financial Printing Division, a Division of Litton Business Systems, Inc., Petitioner v. National Labor Relations Board, et al.*, 111 Sup. Ct. Rep. 2215 (1991). The Pennsylvania Unemployment Compensation Bureau relies upon the *Vrotney Unemployment Compensation Case*, 400 Pa. 440 (1960). But Vrotney was decided years before the above mentioned *Litton* case which was decided by the United States Supreme Court in 1991 and upon which we rely. Accordingly, *Vrotney is* no longer law to the extent that it conflicts with the decision in the *Litton* case.

2. Even if the principle of preemption is not applicable, the holdings of the Pennsylvania Unemployment Compensation Board on the character of work stoppage should not be inconsistent with provisions of National Labor Relations ACT (NLRA) as interpreted by the federal courts. *Litton, ibid.* In the instant case the holding of the Pennsylvania Unemployment Compensation Board is inconsistent and actually antagonistic to the holdings of the federal courts applying the NLRA. Under the NLRA the employer

is not required to continue the arbitration provisions of an expired contract except as to disputes arising prior to the expiration of the contract. However, the Pennsylvania Unemployment Compensation Board in the instant case holds that the employer must agree to full-fledged continuation of the arbitration clause which would require the employer to arbitrate disputes arising from matters after the expiration of the contract.

The holding of the Pennsylvania Unemployment Compensation Board goes even further since it is backed up by sanctions far more potent than sanctions imposed under NLRA, since if the employer won't agree to the determination of the Pennsylvania Unemployment Compensation Board it will make weekly payments to the workers which will have the effect of prolonging the work stoppage and in addition will charge the employer's experience rating with those payments to the employees.

In determining whether a work stoppage is a strike or a lock out, the Pennsylvania Unemployment Compensation Board is legislating in the labor relations field that is preempted by the NLRA to the extent the NLRA covers the field. Under the facts of our case, the Pennsylvania Unemployment Compensation Board has held that the work stoppage is a lock out and the fault of the employer because the employer will not agree to extend the contract including its arbitration provisions whereas, under the same facts, the court, applying the NLRA, would hold the work stoppage is a strike and not the fault of the employer and there would be no sanction against the employer.

3. Finally, petitioner submits that by forcing it to extend the expired labor contract with all its terms on penalty of being charged for all benefits paid, Pennsylvania law deprives petitioner of its property without due process, in violation of the Fourteenth Amendment to the United States Constitution.

CONCLUSION

The petition should be granted so that Schulmerich Carillons, Inc. may be afforded its constitutional right under Article VI, Section 2 of the United States Constitution and the Fourteenth Amendment thereto so that Schulmerich and the Pennsylvania business community may know whether *Litton v. NLRB* is still good law and that a Pennsylvania employee's experience rating under state unemployment compensation law will not be charged for benefits paid during a work stoppage in which the employee acted in accordance with *Litton.*

Respectfully submitted,

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APPENDIX A — ORDER DENYING PETITION FOR ALLOWANCE OF APPEAL DATED SEPTEMBER 9, 1993

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

251 Eastern District
Allocatur Docket 1993

SCHULMERICH CARILLONS, INC.

Petitioner

vs.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW

Respondent

Petition for Allowance of Appeal from Superior Court

ORDER

PER CURIAM:

AND NOW, this 9th day of September, 1993, the Petition for Allowance of Appeal is hereby denied.

A TRUE COPY FROM RECORD
Attest: 9/10/93

s/ William G. Corey
William G. Corey, Esquire
Deputy Prothonotary, Supreme Court of
Pennsylvania, Eastern District

APPENDIX B — OPINION AND ORDER OF THE COMMONWEALTH COURT OF PENNSYLVANIA FILED MARCH 19, 1993

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1035 C.D. 1992
Argued: February 1, 1993

SCHULMERICH CARILLONS, INC.,

Petitioner

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent

BEFORE: HONORABLE JOSEPH T. DOYLE, Judge
HONORABLE ROCHELLE S. FRIEDMAN, Judge
HONORABLE SILVESTRI SILVESTRI, Senior Judge

OPINION BY JUDGE FRIEDMAN FILED: March 19, 1993

Schulmerich Carillons (Employer) appeals from an order of the Unemployment Compensation Board of Review (UCBR) affirming a referee's decision granting unemployment benefits to Claimant, Donna C. Crouch, on behalf of herself and as a representative of similarly situated employees of Employer (Claimants), on grounds that the work stoppage was due to a lockout as opposed to a strike.

Claimants are members of the International Association of Machinists and Aerospace Workers Union (Union), Local 1092. A collective bargaining agreement between the Union and Employer expired at midnight on June 28, 1991. Although negotiations on a

new contract had begun in May, 1991, the parties had not reached an agreement by June 28, 1991.

The Office of Employment Security (OES) determined that Claimant was entitled to compensation because the work stoppage was due to a lockout. Employer appealed and the referee, after hearing, issued a decision affirming the OES. On further appeal, the UCBR concluded that the referee's determination was correct and affirmed without making any additional findings. The factual findings of the referee follow:

> 1. Claimant was last employed as a lathe operator by the Schulmerich Carillons, Inc. from March, 1990, at a rate of $9.41 an hour and her last day of work, for purposes of this appeal, was June 28, 1991.
>
> 2. Claimant is a member of the International Association of Machinists and Aerospace Workers Union, Local 1092.
>
> 3. Claimant's case is serving as representative appeal involving bargaining unit employes employed by the company up to the point a work stoppage occurred because of a labor dispute on July 1, 1991.
>
> 4. There was a collective bargaining agreement (contract) in effect between the parties which expired at midnight on June 28, 1991.
>
> 5. In May, 1991, negotiations began between the company and union aimed at

arriving at a new contract: however, as of claimant's last day of work, no agreement had been reached.

6. The company made a "final offer" on a new contract to the union on June 28, 1991, however, the union membership rejected same.

7. On June 28 and July 1, 1991, the union offered to continue work under the terms and conditions of the expired contract while negotiations continued.

8. The company agreed to permit work to continue under the same economic terms but at no time offered to include all non-economic terms and conditions as well.

9. The union established picket lines on July 1, 1991, and the stoppage continued until August 19, 1991, when agreement was reached on a new three (3) year contract.

10. Claimant and other affected employes returned to work on or about August 19, 1991.

Section §402(d) of the Unemployment Compensation Law[1]

---

1. Act of December 5, 1936, Second Ex. Sess., P.L. (1937) 2897, *as amended*, 43 P.S. §802(d). This statute provides:

> An employee shall be ineligible for compensation for any week

(Cont'd)

provides that employees who are unemployed because of a labor dispute are entitled to unemployment compensation benefits only if the work stoppage is due to a lock-out. The referee, relying on *The Vrotney Unemployment Compensation Case*, 400 Pa. 440, 163 A.2d 91 (1960) and *Philco Corp. v. Unemployment Compensation Board of Review*, 430 Pa. 110, 242 A.2d 454 (1968), determined that the work stoppage was due to a lock-out and not a strike. Under *Vrotney* and *Philco*, the question in determining whether a work stoppage is a strike, attributable to the employees, or a lockout, attributable to the employer, is which party first refused to continue operations under the status quo after the contract technically expired. More recently this court has reaffirmed the rule that any change in the status quo by the employer constitutes a lock-out. *Portec v. Unemployment Compensation Board of Review*, 104 Pa. Commonwealth Ct. 629, 522 A.2d 1180 (1987). Based on the finding that Employer refused to continue certain non-economic terms, the referee determined that Employer was responsible for the change in the status quo. The UCBR affirmed.

On appeal,[2] Employer contends that the decision granting

(Cont'd)

> . . . .
>
> d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed. . . .

2. Our scope of review in unemployment compensation cases where evidence has been presented by both parties is limited to a determination of whether constitutional rights were violated, errors of law committed, or findings of fact are not supported by substantial evidence. *Kirkwood v. Unemployment Compensation Board of Review*, 106 Pa. Commonwealth Ct. 92, 525 A.2d 841 (1987).

benefits is erroneous because §402(d) is pre-empted by federal labor law.[3] We disagree.

Under the doctrine of pre-emption, state law which conflicts with federal law is invalid under the Supremacy Clause of the U.S. Constitution, art. VI, cl. 2. *Baltimore and Ohio R. Co. v. Com., Department of Labor and Industry,* 461 Pa. 68, 334 A.2d 636 (1975), *appeal dismissed,* 423 U.S. 806 (1975). Employer suggests that §402(d) of the Pennsylvania Unemployment Compensation Law, 43 P.S. §802(d), is pre-empted by the National Labor Relations Act (NLRA) because the Pennsylvania unemployment compensation system is subsidized by the federal government. This assertion is misguided. In determining whether federal law pre-empts a state statute, our inquiry is not whether the state receives money from the federal government; rather, we look to congressional intent. *FMC Corp. v. Holliday,* 498 U.S. 52 (1990).

Employer, relying on *Litton Financial Printing Division v. National Labor Relations Board,* __ U.S. __, 111 S. Ct. 2215 (1990), contends further that §402(d) conflicts with the NLRA because it "required" the Employer to continue contract provisions after the contract between Employer and Union expired. Employer's reliance on *Litton* is misplaced. *Litton* held that, under the NLRA, an employer cannot be forced to follow the arbitration terms of an expired collective bargaining agreement unless the dispute arose during the existence of the contract. In this case, the Board's application of 402(d) did not *require* Employer to continue

---

3. In addition to the pre-emption argument, Employer's brief includes one sentence stating that Employer was deprived of property without due process of law in violation of the 14th Amendment to the U.S. Constitution. However, this issue was not properly preserved for appeal. Employer's original petition for appeal makes no mention of a due process violation, and neither the referee nor the UCBR considered the issue. (R.R. at 9a.)

the non-economic terms of the expired contract but merely found that there was a lock-out because Employer did not choose to continue them.

Employer implies that the grant of unemployment benefits penalizes Employer and is equivalent to requiring Employer to continue the non-economic terms. Admittedly, Employer was penalized to some extent for not continuing the expired contract terms, but this was a choice Employer made. Its other option was temporarily to continue all terms of the expired contract until a new contract could be negotiated and accepted. This choice, which is part of the unemployment compensation scheme[4] and applies equally to employers and employees, is not an impermissible infringement on the overall regulatory scheme for labor disputes provided by federal labor legislation. Our supreme court has held that legislation allowing unemployment compensation benefits to locked out employees is not pre-empted by federal labor law *Unemployment Compensation Board of Review v. Sun Oil Company of Pennsylvania*, 476 Pa. 589, 383 A.2d 519 (1978), *appeal dismissed, Sun Oil Co. v. Unemployment Compensation Board of Review*, 440 U.S. 977 (1979), *rehearing denied*, 441 U.S. 968 (1979). Similarly, in *Gladieux Food Services, Inc. v. Unemployment Compensation Board of Review*, 479 Pa. 324, 388 A.2d 678 (1978), the supreme court specifically held that §402(d) is not an impermissible encroachment upon federal regulation of collective bargaining.

---

4. The unemployment compensation law presumes that the interests of both employer and employee are best served by the continued operation of the employer's business. Because work stoppage is adverse to those interests, the party which refuses to maintain the status quo bears the cost. If the employees act to change the status quo, benefits are denied; if the employer acts to change the status quo, benefits are granted. *See Vrotney*, 400 Pa. 440, 163 A.2d 91 (1960).

Appendix B

The U.S. Supreme Court has also addressed and rejected a pre-emption argument similar to the one before us. In New York *Telephone Company v. New York State Department of Labor,* 440 U.S. 519 (1979), the Court held that Congress's enactment of the NLRA and the Social Security Act did not intend to pre-empt a New York statute which allowed striking employees to receive unemployment compensation. Section 402(d) does not regulate the conduct of the parties to a labor dispute any more than the New York statute considered in *New York Telephone.* Thus, Congress could not have intended to pre-empt legislation allowing locked out employees to receive unemployment compensation.

In dicta, the Third Circuit Court of Appeals has made the same analogy between the statute in *New York Telephone* and §402(d) of Pennsylvania Unemployment Law. *Duer Spring & Manufacturing Co., Inc. v. Commonwealth of Pennsylvania Department of Labor and Industry,* 906 F.2d 968 (3d Cir. 1990). There, the court stated:

> While it is true that any award of unemployment compensation law may keep bread in the mouths of the children of the unemployed workers and thereby affect the conduct of the parties to a labor dispute, Pennsylvania's statute no more regulates that conduct than did the New York statute considered in New York Telephone ... [N]either regulated the conduct of the parties in the dispute, although they both ameliorate the effect on the workers of the dispute to some extent.

Id. at 971. We agree with and adopt this reasoning.

Appendix B

Accordingly, we affirm.

s/ Rochelle S. Friedman
ROCHELLE S. FRIEDMAN, JUDGE

Appendix B

IN THE COMMONWEALTH COURT OF PENNSYLVANIA

No. 1035 C.D. 1992

SCHULMERICH CARILLONS, INC.,

Petitioner

v.

UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,

Respondent

ORDER

AND NOW, this *19th* day of *March*, 1993, the order of the Unemployment Compensation Board of Review, dated April 16, 1992, is affirmed.

s/ Rochelle S. Friedmen
ROCHELLE S. FRIEDMAN, JUDGE

APPENDIX C — DECISION OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW DATED JANUARY 21, 1992

PENNSYLVANIA UNEMPLOYMENT COMPENSATION
BOARD OF REVIEW
REFEREE'S DECISION

Decision Mailing Date *1-21-92*
S.C. Acct. No. *168-46-4534*
Appeal No. *91-1-F-1405*
Appeal Date *October 7, 1991*

Concerning the Claim of:
Donna C. Crouch
5 S. Hamilton Street
Telford, PA 18969
cc: Thomas W. Jennings, Att. & Larry Brenner

Employer
Schulmerich Carillons, Inc.
Carillon Hill
Sellersville, PA 18960
cc: Jonathan K. Wright, Attorney

Date and Nature of Office of Employment Security's Determination
9/30/91 – claimant eligible under Section 402(d) – work stoppage

Hearing Appearances:
Claimant

Hearing Date and Location
January 13, 1992 – Norristown, Pennsylvania

Appendix C

Date of Application for Benefits
March 24, 1991

Employer Appeal

Compensable Week Ending Date
July 6, 1991

FINDINGS OF FACT:

1. Claimant was last employed as a lathe operator by the Schulmerich Carillons, Inc. from March, 1990, at a rate of $9.41 an hour and her last day of work, for purposes of this appeal, was June 28, 1991.

2. Claimant is a member of the International Association of Machinists and Aerospace Workers Union, Local 1092.

3. Claimant's case is serving as representative appeal involving bargaining unit employees employed by the company up to the point a work stoppage occurred because of a labor dispute on July 1, 1991.

4. There was a collective bargaining agreement (contract) in effect between the parties which expired at midnight on June 28, 1991.

5. In May, 1991, negotiations began between the company and union aimed at arriving at a new contract; however, as of claimant's last day of work, no agreement had been reached.

6. The company made a "final offer" on a new contract to the union on June 28, 1991; however, the union membership rejected same.

7. On June 28, and July 1, 1991, the union offered to continue work under the terms and conditions of the expired contract while negotiations continued.

8. The company agreed to permit work to continue under the same economic terms but at no time offered to include all non-economic terms and conditions as well.

9. The union established picket lines on July 1, 1991, and the stoppage continued until August 19, 1991, when agreement was reached on a new three (3) year contract.

10. Claimant and other affected employes returned to work on or about August 19, 1991.

REASONING: The Office of Employment Security issued a determination approving benefits under Section 402(d) of Pennsylvania Unemployment Compensation Law. The employer filed a timely appeal.

Section 402(d) of the Law provides that a claimant shall be ineligible for benefits in which his or her unemployment is due to a stoppage of work which exists because of a labor dispute (other than a lockout) at the factory, establishment or other premises at which he or she is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he or she is not participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (2) he or she is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (3) he or she does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage

occurred, any of whom are participating in, or directly interested in, the dispute.

Unless the lockout exception applies, a claimant is ineligible for benefits under Section 402(d) unless he or she can meet the three conjunctive tests set forth therein. Reference to said three tests clearly show that unless the lockout exception is applicable to the present factual situation, the lead claimant, and those similarly situate, would be ineligible for Unemployment Compensation benefits because the bargaining unit employees could not meet any one, let alone all three, of the conjunctive tests. The issue before the Referee then is the applicability or inapplicability of the lockout exception of Section 402(d) to the present case.

Regarding the lockout exception, the Law of Pennsylvania is set forth in the *Vrotney Unemployment Compensation Case*, 400 Pa, 440. In that Pennsylvania Supreme Court Decision, which has been repeatedly cited by subsequent Court decisions, it was held that where a contract has, in fact, expired and a new agreement has not yet been negotiated, the sole test of whether the work stoppage is the responsibility of the employer or of the employes is reduced to whether the employes have offered to continue working so as to avert a work stoppage pending the final settlement of contract negotiations. The question also arises as to whether the employer has agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations. In the *Vrotney Case* the Court went on to state that if the employer refuses to maintain the status quo then the result in work stoppage constitutes a lockout and the Section 402(d) disqualification for Unemployment Compensation benefits in inapplicable.

It was further stated in the leading *Vrotney Case* that "in the very

delicate and sensitive negotiations which are involved in the development of a new collective bargaining agreement, all parties must be sincere in their desire to maintain the continued operation of the employer's enterprise. The Law contemplates that collective bargaining will be conducted in good faith, with a sincere purpose to find a basis for agreement. Neither an adamant attitude of "no contract, no work," on the part of the employes, nor an ultimatum laid down by the employer that work will be available only on his (employer's) terms, are serious manifestations of a desire to continue the operation of the enterprise."

In following the *Vrotney* decision the Court in the *Philco Corporation v. UC Board of Review Case* stated that "since the purpose of our Unemployment Compensation system is to compensate an individual when work has been denied her through no fault of her own, logically the test of whether a work stoppage resulted from a strike or a lockout require us to determine which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing."

Maintenance of the status quo is merely another way of stating that the parties must continue the relationship *as it existed* at the expiration of their agreement. In the present case, the union unequivocally offered to continue work under the terms of the expired agreement pending further negotiations towards a new agreement whereas the record indicates that the employer would agree to a continuation only under the same *economic* terms. The record contains no substantial evidence indicating employer's willingness to permit work to continue for a reasonable time under *all* pre-existing terms and conditions. Since the Courts have ruled that even the smallest change is considered a disruption of the status quo, the Referee must conclude that the stoppage in this case

was a lockout since it was the employer who first breached the status quo. Accordingly, claimant is not ineligible for benefits under Section 402(d) of the Law.

The employer argues that even if the stoppage of work was a lockout during the first week, it was converted to a strike effective July 9, 1991, in conjunction with a letter sent to union employees by the president of the company. A reading of this correspondence, however, indicates a reiteration of the employer's offer of work on the *same economic* terms. Therefore, the lockout was not converted to a strike as of July 9, 1991, as contended by employer. With regard to the employer's federal pre-emption agreement, this issue has previously been raised and rejected by the Courts. Finally, the Referee finds no merit in employer's contention that Unemployment Compensation benefits should be offset by strike benefits and vacation payments purportedly received by claimant and other union employes during the period at issue.

ORDER: The determination of the Office of Employment Security is affirmed. Benefits for compensable week ending July 6, 1991, are allowed.

s/ Matthew J. Ercolino
MATTHEW J. ERCOLINO, REFEREE

APPENDIX D — NOTICE OF DETERMINATION OF THE COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF LABOR AND INDUSTRY DATED SEPTEMBER 30, 1991

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF LABOR AND INDUSTRY
HARRISBURG, PA 17120

NOTICE OF DETERMINATION

SCHULMERICH CARILLONS, INC. 1991 WORK STOPPAGE

CLAIMANT:
Donna C. Crouch
5 S. Hamilton St.
Telford, Pa. 18969
SS # 168-46-4534

EMPLOYER:
Schulmerich Carillons, Inc.
Carillon Hill
Sellersville, PA 18960

UNION:
International Association of
Machinists & Aerospace Workers
Local Lodge 1092 of District 152
634 West End Blvd.
Quakertown, PA 18951

FINDINGS OF FACT

1. The Claimant's last day of work at Schulmerich Carillons, Inc. (Employer) was Friday, June 28, 1991.

2. The Claimant worked under a collective bargaining agreement (Contract) between the Employer and the International Association of Machinists and Aerospace Workers, Local 1092 (Union), which expired at 12:01 a.m. on Saturday, June 29, 1991.

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3. The Claimant is represented by the Union.

4. Prior to the expiration of the Contract, the Union and Employer had negotiated for a new agreement, but at the time of the expiration of the contract, no settlement had been reached on the terms and conditions of a new contract.

5. Prior and subsequent to the expiration of the pre-existing Contract, the Union offered to continue working under the terms and conditions of the pre-existing Contract.

6. Although the Employer agreed to extend the economic terms of the pre-existing Contract pending a new agreement, the Employer would not maintain the grievance and arbitration provisions of the pre-existing Contract pending a new agreement.

7. Continuing work was not available under the terms and conditions of the pre-existing Contract.

8. On July 1, 1991, the Union initiated a work stoppage and established and maintained picket lines at the Employer's premises.

9. The work stoppage has not been resolved and is continuing at this time.

DISCUSSION

Section 402(d) of the Pennsylvania Unemployment Compensation Law (Law) provides that an employee shall be ineligible for any week:

> [I]n which his unemployment is due to a

> stoppage of work, which exists because of a labor dispute (other than a lockout) at the factory, establishment, or other premises at which he was last employed: Provided, that this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in, the labor dispute which caused the work stoppage, and (2) he is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the work stoppage, and (3) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, or directly interested in, the dispute.

Where the work stoppage arises from a labor dispute, the Claimant has the burden of proving that the stoppage was the result of a lockout. *McCormick Dray Lines v. Unemployment Compensation Board of Review* (UCBR), 74 Pa. Commonwealth Ct. 181, 184, 459 A.2d 74, 76 (1983).

In *Erie Forge & Steel Corp. v. UCBR*, 400 Pa. 440, 163 A.2d 91, (1960), the Pennsylvania Supreme Court applied Section 402(d) to situations in which a new collective bargaining agreement had not been finalized when the work stoppage began. The Court stated:

> When the contract has in fact expired, a new contract as not yet been negotiated, the sole test . . . of whether the work stoppage is the

> responsibility of the employer or the employees is reduced to the following: Have the employees offered to continue working for a reasonable period of time under the terms and conditions of the pre-existing contract, and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lock-out". . . .

Id. at 444-445, 163 A.2d at 93-94.

In *Philco Corp. v. UCBR*, 430 Pa. 101, 242 A.2d 454 (1968), the Court held:

> [L]ogically the test of whether a work stoppage resulted from a strike or a lockout requires us to determine which side, union or management, first refused to continue operations under the status quo after the contract had technically expired, but while negotiations were continuing. . . .

Id. at 103, 242 A.2d at 455.

The Courts have consistently held that, after the expiration of the contract, the party changing the status quo will be deemed to have caused the work stoppage and will be held responsible for the unemployment compensation consequences. *Borello v. UCBR*, 490 Pa. 607, 417 A.2d 205 (1980), *Grech v. UCBR*, 56 Pa.

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Commonwealth Ct. 9, 423 A.2d 1364 (1981). Any change in the status quo by the Employer constitutes a lockout. *Portec, Inc., RMC Division v. UCBR*, 104 Pa. Commonwealth Ct. 629, 522 A.2d 1189 (1987).

The Employer is responsible for initiating a lockout by not permitting work to continue under the terms and conditions of the pre-existing Contract. The Union was willing to work under the terms and conditions of the pre-existing Contract.

Since continuing work under the terms and conditions of the pre-existing Contract was not available to the Claimant, the Claimant's conduct was not disqualifying under Section 402(d) of the Law.

DETERMINATION

The Claimant is not ineligible for benefits under Section 402(d) of the Law for the week ending July 6, 1991, and thereafter, unless and until there is a material change of fact or law.

Signature: s/ John Taylor
John Taylor

Mailing Date: Sept. 30, 1991

The last date to file an appeal from this decision is Oct. 15, 1991

APPEAL INSTRUCTIONS

Under Section 501(e) of the PA UC Law, this determination becomes final unless an appeal is timely filed. If you want to file an appeal, forms may be obtained from any office for Employment Security. Appeals may be filed in person, or by mail, with the job center that issued the determination. If the appeal is filed by mail, it

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must be postmarked on or before the last date to appeal, as indicated, and forwarded to:

(job center address)

OFFICE OF EMPLOYMENT SECURITY
471 E. COUNTY LINE RD. 0112
HATBORO, PA 19040

APPENDIX E — RELEVANT STATUTE AND CONSTITUTIONAL PROVISIONS

43 P.S. § 802

§ 802. Ineligibility for compensation

An employe shall be ineligible for compensation for any week—

(a) In which his unemployment is due to failure, without good cause, either to apply for suitable work at such time and in such manner as the department may prescribe, or to accept suitable work when offered to him by the employment officer or by any employer, irrespective of whether or not such work is in "employment" as defined in this act: Provided, That such employer notifies the employment office of such offer within seven (7) days after the making thereof; however this subsection shall not cause a disqualification of a waiting week or benefits under the following circumstances: when work is offered by his employer and he is not required to accept the offer pursuant to the terms of the labor-management contract or agreement, or pursuant to an established employer plan, program or policy: Provided further, That a claimant shall not be disqualified for refusing suitable work when he is in training approved under section 236(a)(1) of the Trade Act of 1974.

(a)(1) In which his unemployment is due to failure to accept an offer of suitable full-time work in order to pursue seasonal or part-time employment.

(b) In which his unemployment is due to voluntarily leaving work without cause of a necessitous and compelling nature, irrespective of whether or not such work is in "employment" as defined in this act: Provided, That a voluntary leaving work

because of a disability if the employer is able to provide other suitable work shall be deemed not a cause of a necessitous and compelling nature. And provided further, That no employe shall be deemed to be ineligible under this subsection where as a condition of continuing in employment such employe would be required to join or remain a member of a company union or to resign from or refrain from joining and bona fide labor organization, or to accept wages, hours, or conditions of employment not desired by a majority of the employes in the establishment or the occupation, or would be denied the right of collective bargaining under generally prevailing conditions, and that in determining whether or not an employe has left his work voluntarily without cause of a necessitous and compelling nature, the department shall give consideration to the same factors, insofar as they are applicable, provided, with respect to the determination of suitable work under section four (t): And provided further, That the provisions of this subsection shall not apply in the event of a stoppage of work which exists because of a labor dispute within the meaning of subsection (d). Provided further, That no otherwise eligible claimant shall be denied benefits for any week in which his unemployment is due to exercising the option of accepting a layoff, from an available position pursuant to a labor-management contract agreement, or pursuant to an established employer plan, program or policy: Provided further, That a claimant shall not be disqualified for voluntarily leaving work, which is not suitable employment to enter training approved under section 236(a)(1) of the Trade Act of 1974. For purposes of this subsection the term "suitable employment" means with respect to a claimant, work of a substantially equal or higher skill level than the claimant's past "adversely affected employment" (as defined in section 247 of the Trade Act of 1974), and wages for such work at not less than eighty per centum of the worker's "average weekly wage" (as defined in section 247 of the Trade Act of 1974).

(c) With respect to which or a part of which he has received or is seeking unemployment benefits under an unemployment compensation law of any other state or of the United States: Provided, That if the appropriate agency of such other state or of the United States finally determines that he is not entitled to such unemployment benefits, the disqualification shall not apply.

(d) In which his unemployment is due to a stoppage of work which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed: Provided, That this subsection shall not apply if it is shown that (1) he is not participating in, or directly interested in the labor dispute which caused the stoppage of work, and (2) he is not a member of an organization which is participating in, or directly interested in, the labor dispute which caused the stoppage of work, and (3) he does not belong to a grade or class of workers of which, immediately before the commencement of the stoppage, there were members employed at the premises at which the stoppage occurs, any of whom are participating in, or directly interested in, the dispute.

(e) In which his unemployment is due to his discharge or temporary suspension from work for willful misconduct connected with his work, irrespective of whether or not such work is "employment" as defined in this act; and

(f) Repealed. 1974, Dec. 5, P.L. 769, No. 261, § 3, imd. effective.

(g) Any part of which is included in the one-year period immediately following the date on which he is finally convicted of the illegal receipt of benefits under this act in any penal proceedings instituted against him under the provisions of this act or any other statute of the Commonwealth.

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(h) In which he is engaged in self-employment: Provided, however, That an employe who is able and available for full-time work shall be deemed not engaged in self-employment by reason of continued participation without substantial change during a period of unemployment in any activity including farming operations undertaken while customarily employed by an employer in full-time work whether or not such work is in "employment" as defined in this act and continued subsequent to separation from such work when such activity is not engaged in as a primary source of livelihood. Net earnings received by the employe with respect to such activity shall be deemed remuneration paid or payable with respect to such period as shall be determined by rules and regulations of the department.

(i) Repealed. 1983, July 21, P.L. 68, No. 30, § 17, effective January 1, 1984.

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UNITED STATES CONSTITUTION, ARTICLE 6, CLAUSE 2

Clause 2. Supreme Law of Land

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CONSTITUTION, AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of

representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

APPENDIX F — VROTNEY UNEMPLOYMENT COMPENSATION CASE, *ERIE FORGE AND STEEL CORPORATION V. UNEMPLOYMENT COMPENSATION BOARD OF REVIEW* (ET AL., APPELLANT)

Argued March 17, 1960. Before JONES, C. J., MUSMANNO, JONES, COHEN, BOK AND EAGEN, JJ.

Appeals, Nos. 113, 114, 115, 116, 117 and 118, March T., 1959, from judgments of Superior Court, April T., 1957, Nos. 96 to 99, inclusive, 101 and 102, reversing Unemployment Compensation Board of Review, No. B-43717, in case of Erie Forge and Steel Corporation v. Unemployment Compensation Board of Review et al. Judgments reversed.

Same case in Superior Court: 188 Pa. Super. Ct. 405.

Proceedings on appeal from decision of Unemployment Compensation Board of Review allowing compensation.

Superior Court reversed decision, opinion by WOODSIDE, J.; dissenting opinion by WRIGHT, J. Appeal to Supreme Court allowed.

Sidney G. Handler, with him *James G. Hanes,* for appellants.

David C. Harrison, Deputy Attorney General, with him *Sidney Reuben,* Assistant Attorney General, and *Anne X. Alpern,* Attorney General, for Unemployment Compensation Board of Review.

John E. Britton, with him *Henry A. MacDonald* and *Gifford, Graham, MacDonald & Illig,* for employer, appellee.

Appendix F

OPINION BY MR. JUSTICE COHEN, June 30, 1960:

These are appeals by the claimants from the judgments of the Superior Court denying unemployment compensation to the claimants. The Superior Court determined that the claimants were unemployed because the work stoppage was the result of a strike and not a lockout. Administratively, the Bureau first denied the claimants compensation but the referee and the Unemployment Compensation Board of Review determined that the work stoppage was a lockout and allowed compensation to the claimants and their fellow employees.

On appeal to the Superior Court, determinations of the referee and the Bureau were reversed and we allowed the petition for appeal to our Court.

Negotiations had been going on for some time. The Union asked for a five cent per hour increase and certain fringe benefits pertaining to insurance and pensions which would have totaled approximately nine cents an hour. The Company made no offer on wages and fringe benefits until August 26 when it offered six cents an hour increase to be divided between wages and fringe benefits in whatever way the Union desired. The increase was, however, contingent upon the fact that the premiums and tonnage systems would be abolished. Although all the employees were offered the hourly increase, the evidence shows that some, although not all of those on incentive pay, would be subject to a loss of take home pay.

On August 28, at a Union meeting the Company offer was rejected and on Monday, August 30 the Union informed the employers of the result of the meeting and stated that if a new contract was not consummated by midnight August 31 (when the old contract expired) a strike would take place.

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At a meeting on the evening of August 31, the employees proposed to the Company that they continue working on the basis of the existing agreement for an indefinite period of time with a five day cancellation clause by either party to permit additional time for negotiations. The employer refused to agree to such extension and informed the Union that work would be available only on the basis of its original offer. The employees refused to accept the Company's proposal. The employees continued to work their regular shifts until midnight, August 31. Those on the 11:00 shift reported at 11:00 and worked until midnight. The employer continued to hold its plant open and there was work available for the claimants and their fellow employees, but only under the new conditions of employment laid down by the employer.

The above statement represents the material facts as recited by Judge Woodside in his opinion for the court in 188 Pa. Superior Ct. 405, 146 A. 2d 751 (1958).

In the very delicate and sensitive negotiations which are involved in the development of a new collective bargaining agreement to replace one that is nearing its expiration, all parties must be sincere in their desire to maintain the continued operation of the employer's enterprise. The law contemplates that collective bargaining will be conducted in good faith, with a sincere purpose to find a basis for agreement. Neither an adamant attitude of "no contract, no work" on the part of the employees, nor an ultimatum laid down by the employer that work will be available only on his (employer's) terms, are serious manifestations of a desire to continue the operation of the enterprise. While either or both of these positions may legitimately be taken by the parties during the bargaining negotiations prior to the expiration of the existing contract, when the contract has in fact expired and a new agreement has not yet been negotiated, the sole test under §402(d)

of the Unemployment Compensation Law, Act of December 5, 1936, P. L. (1937) 2897, art. IV, §402; as amended by the Act of June 20, 1939, P. L. 458, §2; Act of April 23, 1942, P. L. 60, §4; Act of May 29, 1945, P. L. 1145, §9; Act of June 30, 1947, P. L. 1186, §2; Act of May 23, 1949, P. L. 1738, §11, 43 PS §802(d),[1] of whether the work stoppage is the responsibility of the employer or the employees is reduced to the following: Have the employees offered to continue working for a reasonable time under the pre-existing terms and conditions of employment so as to avert a work stoppage pending the final settlement of the contract negotiations; and has the employer agreed to permit work to continue for a reasonable time under the pre-existing terms and conditions of employment pending further negotiations? If the employer refuses to so extend the expiring contract and maintain the status quo, then the resulting work stoppage constitutes a "lockout" and the disqualification for unemployment compensation benefits in the case of a "stoppage of work because of a labor dispute" does not apply.

This was the test under §402(d) laid down by Judge Reno in *Hogan Unemployment Compensation Case,* 169 Pa. Superior Ct. 554, 83 A. 2d 386 (1951), followed by Judge Ross in *Leto Unemployment Compensation Case,* 176 Pa. Superior Ct. 9, 106 A. 2d 652 (1954), and by Judge Wright in *McGinnis Unemployment Compensation Case,* 184 Pa. Superior Ct. 95, 132 A. 2d 749 (1957), and this is the test which we now adopt in the instant case.

It has been long established that it is the duty of the

---

1. Insofar as is here pertinent, Section 402(d) now reads: "An employee shall be ineligible for compensation for any week — (d) In which his unemployment is due to a stoppage of work, which exists because of a labor dispute (other than a lock-out) at the factory, establishment or other premises at which he is or was last employed. . . ."

compensation authorities to ascertain the final cause and responsibility for the work stoppage. *McGinnis Unemployment Compensation Case,* supra at 101; *Leto Unemployment Compensation Case,* supra at 15. The referee below found as a fact that when the existing contract expired, the employer rejected a good faith union offer to maintain the status quo for a reasonable time pending further negotiation, and hence held that the claimants are not barred by the terms of §402(d) from receiving unemployment compensation benefits. The Board affirmed the referee's findings of fact and also allowed the claims, holding expressly that the labor dispute must be classified as a "lockout" since the employer was, in the end, responsible for the work stoppage. We agree with the appellants that the findings of fact by the Board and the referee are supported by the evidence. Such findings are conclusive on appeal. Act of December 5, 1936, P. L. (1937) 2897, art. V, §510, as amended by the Act of September 29, 1951, P. L. 1580, §18, 43 PS §830. Once we accept as fact that the ultimate responsibility for the work stoppage lay with the employer, it is clear that there has been a "lockout" thus qualifying the claimants for benefits under the Act.

Judgments of the Superior Court reversed and the decisions of the Unemployment Compensation Board of Review reinstated.

(2)

Supreme Court, U.S.
FILED
JAN 10 1994
OFFICE OF THE CLERK

No. 93-906

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1993

SCHULMERICH CARILLONS, INC.,
Petitioner,

v.

THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION BOARD OF REVIEW,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA

BRIEF IN OPPOSITION OF RESPONDENT

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**Counsel of Record*

BEST AVAILABLE COPY

QUESTION PRESENTED FOR REVIEW

Whether the lower court's conclusion that Section 402(d) of the Pennsylvania Unemployment Compensation Law is not preempted by federal labor law is consistent with the legislative history of the Social Security Act and supported by this Court's previous decisions in the *New York Telephone* and *Baker* cases?

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STATEMENT OF THE CASE

This case involves the grant of unemployment compensation benefits by the Pennsylvania Unemployment Compensation Board of Review ("the Board") to employees of Petitioner, Schulmerich Carillons, Inc., ("Employer"). The employees were at all relevant times represented by the International Association of Machinists and Aerospace Workers Union, Local 1092 ("Union"). The courts below upheld the grant of benefits based on the provisions of Pennsylvania's Unemployment Compensation Law, which allow for the awarding of unemployment compensation to employees who are unemployed due to a lockout. 43 P.S. §802(d), Act of December 5, 1936, Second Ex. Sess., P.L. 2897 (1937). See page 25a of the Appendix ("App. at

25a") to the Petition for Writ of Certiorari ("Petition"). The Board's findings of facts, fully adopted by the lower courts, are as follows.

The collective bargaining agreement in effect between the Union and the Employer expired at midnight on June 28, 1991. App. at 3a. In May 1991, the parties commenced negotiations aimed at arriving at a new contract; however, as of June 28, 1991, no agreement had been reached. App. at 4a. The Employer made a final offer on a new contract to the Union on June 28, 1991, but it was rejected. *Id.*

On June 28 and July 1, 1991, the Union offered to continue work under the same terms and conditions of the expired contract while negotiations continued. *Id.* The

Employer agreed to permit work to continue under the expired labor agreement's economic terms, but at no time offered to include all the preexisting non-economic terms and conditions of employment. *Id.*[1] The Union established picket lines and employees stopped working on July 1, 1991. The stoppage continued until August 19, 1991, when an agreement was reached on a new three-year contract. *Id.* The employees returned to work on or about August 19, 1991. *Id.*

Pennsylvania's Bureau of Unemployment Compensation Benefits and Allowances ("BUCBA") was presented with a claim for unemployment compensation

[1]Contrary to the Board's and the lower court's findings of fact in this regard, the Employer in its Petition misrepresents the record when it states that it was agreeable to continue all of the contractual terms and conditions with the possible exception of the arbitration clause. Petition at p. 5.

benefits for the period the employees were out of work. BUCBA concluded that the work stoppage was the result of a lockout, consistent with the Pennsylvania Supreme Court's analysis in the *Vrotney Unemployment Compensation Case,* 400 Pa. 440, 163 A.2d 91 (1960). App. at 11a, 14a, 29a. In *Vrotney*, the supreme court held that an employer's refusal to allow employees to continue working under the terms and conditions of the expired contract constitutes a lockout. Conversely, the court concluded that a refusal by employees to return to work under the terms and conditions of the expired contract constitutes a strike.

After a hearing, the Unemployment Compensation Referee affirmed BUCBA's determination, rejecting the

Employer's argument that the strike/lockout distinction was preempted by federal labor law, noting that this same issue had previously been raised and rejected by the Pennsylvania courts. App. at 11a, 16a. On appeal, the Board wholly adopted as its own the Referee's Findings of Facts and Determinations. On further appeal, the Commonwealth Court upheld the Board's grant of benefits and, thereafter, the Pennsylvania Supreme Court, on September 9, 1993, denied the Employer's Petition for Allowance of Appeal without an opinion. App. at 7a-9a; 1a.

SUMMARY OF ARGUMENT

The Petition fails to provide any legitimate basis or reason for this Court to grant the writ of certiorari. Relying on one case involving facts that are irrelevant to the instant matter, the Petition asserts that Pennsylvania's unemployment compensation statute is preempted by, and is inconsistent with, federal labor law principles--a contention that specifically ignores and disregards this Court's holdings in the *New York Telephone Co.* and *Baker* cases, as well as the Third Circuit's specific holding in the *Duer Spring* case. The Petition also attempts to raise a constitutional claim that it waived in the lower courts and which is, accordingly, not properly before this Court.

Whittled to its core, this Petition arises out of the Employer's dissatisfaction and/or disagreement with the manner in which Pennsylvania's legislature has chosen to condition the receipt of unemployment benefits and the lower courts' enforcement of those conditions. Such an appeal is fatally deficient to warrant this Court's review. The Petition should be denied.

REASONS FOR DENYING THE WRIT

SECTION 402(D) OF THE PENNSYLVANIA UNEMPLOYMENT COMPENSATION LAW IS NEITHER PREEMPTED BY, NOR INCONSISTENT WITH, FEDERAL LABOR LAW, AND IN AWARDING BENEFITS HEREIN, PENNSYLVANIA WAS MERELY EXERCISING THE BROAD AUTHORITY AND DISCRETION AFFORDED IT BY BOTH CONGRESS AND THIS COURT TO OPERATE ITS UNEMPLOYMENT INSURANCE PROGRAM AND ESTABLISH QUALIFYING REQUIREMENTS WITHOUT FEDERAL INTERFERENCE.

The Employer contends that because Pennsylvania's unemployment compensation system is subsidized by the federal government, it must be preempted by federal labor law to the extent that the state law provides benefits under

circumstances in which the employer is acting in compliance with federal law. Relying exclusively on this Court's decision in *Litton Financial Printing Division v. National Labor Relations Board, a Division of Litton Business Systems, Inc.*, 111 S. Ct. 2215 (1991), a case which held that an employer does not commit an unfair labor practice under the National Labor Relations Act ("NLRA") when it refuses to arbitrate post-contract expiration grievances, the Employer reasons that the state cannot award benefits based on an employer's refusal to allow employees to continue to work under all of the terms and conditions of an expired contract, including the arbitration clause. The Employer views this as a conflict between federal and state law and argues it is a basis for this Court to grant certiorari. The Employer is wrong.

Indeed, it is the federal involvement in state unemployment insurance programs, referred to by the Employer herein as a basis for a finding of preemption, that led to this Court's previous refusal to find a state unemployment compensation statute to be preempted by the NLRA. In *New York Telephone Company v. New York State Department of Labor*, 440 U. S. 519 (1979), a case ignored by the Employer in its Petition, this Court concluded that New York State's law providing for the awarding of unemployment benefits to striking employees was not preempted by the NLRA. Responding to the employer's contention, similar to that of the Employer herein, that awarding benefits to striking employees forces an employer to do that which the federal labor law does not require (i.e. finance a strike), the majority of the Court pointed to the legislative history of the Social Security Act,

as "[making] it absolutely clear that Congress intended the several states to have broad freedom in setting up the types of unemployment compensation that they wish." 440 U. S. at 537. The Court further stated:

> [W]hen Congress wished to impose or forbid a condition for compensation, it did so explicitly; the absence of such an explicit condition was therefore accepted as a strong indication that Congress did not intend to restrict the State's freedom to legislate in this area.

Id. at 538.

Although the Court explicitly recognized that paying benefits to strikers arguably alters the delicate balance of bargaining power that the NLRA sought to protect, it

concluded that Congress intended to tolerate such an impact on the collective bargaining process in order to effectuate the joint federal-state unemployment insurance scheme set forth in Title IX of the Social Security Act, which was passed within five weeks of the NLRA. *Id.* at 544. *See also Ohio Bureau of Employment Services v. Hodory*, 431 U. S. 471 (1977).

Pennsylvania's statute no more regulates or impacts the collective bargaining process than does New York's statute. Indeed, Pennsylvania has chosen a much less expansive policy than New York by refusing to award benefits to strikers, which pursuant to the *New York Telephone* case it could permissibly do. Rather, it has chosen to make benefits available only to employees that are locked out, "mak[ing] the strike/lockout distinction on

the basis of the status quo, a neutral objective standard which does not tilt the scale in either direction." *Duer Spring and Manufacturing Co., Inc. v. Commonwealth of Pennsylvania, Department of Labor and Industry*, 906 F.2d 968, 971 (3d Cir. 1990).[2] As aptly described by the lower court, Pennsylvania's statute does not require the employer to do anything, but rather, presents an employer with a choice that applies equally to employers and employees--that is, whether to alter the status quo. App. at 7a and cases cited therein.

That Pennsylvania's unemployment compensation law allegedly serves as an inducement for an employer to

[2]In *Duer*, another case ignored by the Employer, the United States Court of Appeals for the Third Circuit, relying on the *New York Telephone* case, rejected an almost identical preemption argument as it applied to the very same lockout provision at issue here.

take action that it would not otherwise be required to take under federal law is of no moment. Indeed, the Employer's argument is no different than striking employees contending that they are entitled as a matter of federal preemption to unemployment compensation benefits based on their protected NLRA right to strike--a proposition specifically rejected in *New York Telephone*. Moreover, such "inducement" is no different than that presented to employees in *Baker v. General Motors Corp.*, 478 U. S. 621 (1986). In *Baker*, this Court affirmed the principles set forth in *New York Telephone* and upheld Michigan's unemployment compensation law depriving compensation to employees that contribute to a strike fund. This Court rejected the employees' contention, almost identical to that raised by the Employer herein, that denying benefits interfered with their rights under the NLRA; namely, the

right to support a strike by contributing to a strike fund. *Id.* at 636-638. *Baker* makes clear that while there may be some interplay between the NLRA and state unemployment statutes, this Court has refused to find preemption based on this interplay, even where the failure to preempt adversely affects an employee's right to compensation. The refusal to preempt is based on a neutral federal policy, derived from the legislative history of the Social Security Act and prior decisions of this Court, in favor of allowing states to operate unemployment insurance programs without federal interference, save for those conditions specifically set forth in the Social Security Act.[3]

[3]Other states have similarly awarded benefits to employees even where the effect of doing so might impact on an employer's ability to exercise rights available under federal labor law. *See Federico, et al. v. Brannan Sand & Gravel Co.*, 788 P.2d 1268 (Colo. 1990), *Plymouth-Stamping v. Lipshu, et al.*, 431 Mich. 1, 461 N.W.2d 859 (Mich. 1990), *Four Queens, Inc. v. Board of Review*, 105 Nev. 53, 769 P.2d 49 (Nev. 1989), and *Baugh v. United Telephone Co.*, 54 Ohio St. 2d 419, 377 N.E.2d 766 (Ohio 1978) (cases where permanently replaced striking employees were awarded benefits notwithstanding employers' legal right to replace employees during a strike).

Accordingly, the Petition utterly fails to provide any basis on which this Court should review this matter. It has not pointed to any conflict between the decision below and any other state court decision, or decisions of any federal court. In an attempt to raise a "conflict," it relies solely on one case of this Court not directly relevant to the instant issue. The Petitioner ignores a series of United States Supreme Court cases and a federal circuit court case supporting the conclusion that the decision below was consistent with federal law and should not be preempted. All that remains is the Petitioner's disagreement with the outcome of the decision below. The Petition should be denied.[4]

[4]In its Petition, the Employer also raises a Fourteenth Amendment argument. The lower court specifically refused to address this assertion based on the Employer's failure to raise it in a timely fashion. App. at 6a, n.3. Having waived this contention below, and having failed in the Petition to specifically challenge the lower court's refusal to address its constitutional claim, this issue is not properly before this Court. *See Yee v. City of Escondido, Calif.*, 112 S. Ct. 1522, 1531 (1992); *Delta Airlines v. August*, 450 U. S. 346, 362 (1981).

CONCLUSION

For the foregoing reasons, Respondent, Unemployment Compensation Board of Review requests that the Petition for Certiorari be denied.

Respectfully submitted,

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